

# COVINGTON

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG  
LONDON LOS ANGELES NEW YORK PALO ALTO  
SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

E. Sanderson Hoe

Covington & Burling LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, DC 20001-4956  
T +1 202 662 5394  
shoe@cov.com

## By Electronic Mail

November 30, 2018

Foggy Bottom Association  
904 New Hampshire Ave NW  
Washington, DC 20037  
ATTN: Marina Streznewski

Advisory Neighborhood Commission 2A  
Foggy Bottom, West End  
Single Member District 2A04  
ATTN: Commissioner William K. Smith

**Re: Procurement Process Underlying a Public-Private  
Partnership Agreement between the District of Columbia  
and District Hospital Partners, L.P. for a New Hospital  
Servicing Wards 7 and 8**

Dear Ms. Streznewski and Dr. Smith:

You have requested that we review the Government of the District of Columbia's ("the District") intended partnership with District Hospital Partners, L.P. d/b/a George Washington University Hospital ("DHP"), to build, operate, and maintain a new 100- to 150-bed hospital on the St. Elizabeths East Campus in Ward 8 (the "St. Elizabeths project").<sup>1</sup> The Mayor of the District of Columbia has called this engagement a "public-private partnership."<sup>2</sup>

---

<sup>1</sup> See Letter of Intent between The Government of the District of Columbia and District Hospital Partners, L.P. d/b/a/ George Washington University Hospital (August 10, 2018), 1-2, [https://dhcf.dc.gov/sites/default/files/dc/sites/dhcf/page\\_content/attachments/DC-GW%20New%20Hospital%20LOI%20--%20Signed%20Copy.pdf](https://dhcf.dc.gov/sites/default/files/dc/sites/dhcf/page_content/attachments/DC-GW%20New%20Hospital%20LOI%20--%20Signed%20Copy.pdf).

<sup>2</sup> Mayor Bowser Announces Major Milestone in Partnership with The George Washington University Hospital for New Hospital and Health Services, Executive Office of the Mayor,

## COVINGTON

Foggy Bottom Association  
Advisory Neighborhood Commission 2A  
November 30, 2018  
Page 2

We understand that the District conducted a sole-source procurement to retain Huron Consulting Services, LLC (“Huron”) as an advisor for the St. Elizabeths project, and Huron presented the District with two potential processes for choosing partners: a “direct negotiation” process and a “request for proposal (RFP) process.”<sup>3</sup> Huron recommended the first option, but advised that the second option “may be needed” due to “legal requirements.”<sup>4</sup> As described by Huron, the “direct negotiation” process included identification of interested parties, selection of finalists, receipt and presentation of proposals from finalists, selection of a “preferred primary partner,” and finally, negotiation and execution of a memorandum of understanding.<sup>5</sup>

We understand that the District opted for a “direct negotiation” process, apparently concluding that an RFP process was not legally required. The District, to our knowledge, approached a small number of potential partners, meeting and negotiating directly with each and ultimately chose DHP for execution of a memorandum of understanding. At this point, we have not been made aware of any evidence that the District provided each interested party a common set of evaluation criteria, which is at the core of any competitive procurement, or that relative weights were assigned to each criterion, or that the District subsequently scored the proposals to make its selection of DHP, all as required by DC public-private partnership law.

---

<https://mayor.dc.gov/release/mayor-bowser-announces-major-milestone-partnership-george-washington-university-hospital-new>.

<sup>3</sup> *Huron Full Summary Report (March 2018)*, DC Department of Health Care Finance, slide 10, [https://dhcf.dc.gov/sites/default/files/u23/E%20-%20UMC\\_CLIN%207%20-%20Full%20Report%20Summary%203.22.2018%20140oct.pdf](https://dhcf.dc.gov/sites/default/files/u23/E%20-%20UMC_CLIN%207%20-%20Full%20Report%20Summary%203.22.2018%20140oct.pdf).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at slide 16.

## COVINGTON

Foggy Bottom Association  
Advisory Neighborhood Commission 2A  
November 30, 2018  
Page 3

You have advised further that, after being selected as the preferred primary partner for the St. Elizabeths project, DHP insisted that the District grant it a waiver of the Certificate of Need requirement for a new 270-bed hospital tower that DHP intends to construct next to the existing George Washington University hospital facility (“GWU hospital”) in Ward 2 (the “Tower project” or the “Tower”). We understand that DHP presented this requirement as a non-negotiable condition for its agreement to enter into a public-private partnership to build, own, and operate the new hospital on the St. Elizabeths campus. As a non-negotiable condition for entering into a public-private partnership agreement, waiver of the Certificate of Need for the Tower became a material element of DHP’s proposal. You also have advised that DHP is the owner of GWU Hospital and that Universal Health Services—the majority owner of DHP—operates GWU Hospital.

We further understand that DHP introduced its non-negotiable condition *after* the District selected DHP as the “preferred primary partner.” In our understanding, the District has not evaluated the extent to which DHP’s non-negotiable condition either enhanced or degraded DHP’s proposal, and therefore its impact on the District’s selection of DHP. In addition, neither a separate medical facility such as the Tower, nor waiving a Certificate of Need for such a facility, appears to have been part of any evaluation criteria for the St. Elizabeths project.

This letter examines competitive requirements under District law and well-accepted procurement principles when the District is entering into public-private partnerships. Based upon the understandings set forth above, it appears that any final public-private partnership agreement between the District and DHP for the St. Elizabeths project conditioned on waiving the Certificate of Need for DHP’s separate 270-bed tower, without evaluating the condition as

## **COVINGTON**

Foggy Bottom Association  
Advisory Neighborhood Commission 2A  
November 30, 2018  
Page 4

part of the District's source-selection process, likely contravenes DC public-private partnership law and, therefore, could be subject to challenge. Our view is based solely upon facts you have provided to us or that we separately obtained which are stated above. Should any of those facts prove incorrect or there are additional facts which are unknown to us at this time, we would need to reconsider our view.

Public-private partnerships in the District are subject to the requirements of D.C. Code Title 2 and D.C. Municipal Regulations Title 27. These requirements guarantee a competitive process by providing that "a public-private partnership shall be solicited by the Office [of Public-Private Partnerships] only through a competitive bid process in which a request for proposals is issued." D.C. Code § 2-273.03(a) (2018). Such requests for proposals must contain:

(1) A detailed description of the scope of the proposed public-private partnership project; (2) The material terms and conditions applicable to the procurement and any resulting contract; and (3) The criteria for evaluation and selection of a proposal, which shall indicate the relative weight given to each criterion set forth in subsection (c) of this section.

(c) The evaluation and selection criteria in a request for proposals shall include the following, each of which shall be given a relative weight:

(1) Cost;

(2) Delivery time;

(3) Financial commitment required of public entities;

## **COVINGTON**

Foggy Bottom Association  
Advisory Neighborhood Commission 2A  
November 30, 2018  
Page 5

- (4) Capabilities, related experience, facilities, or techniques of the proposer or unique combinations of these qualities that are integral factors for achieving the proposal objectives;
- (5) Value-for-money and public sector comparator analysis of the proposal;
- (6) Novel methods, approaches, or concepts demonstrated by the proposal;
- (7) Scientific, technical, or socioeconomic merits of the proposal;
- (8) Potential contribution of the proposal to the mission of the District;
- (9) How the proposal benefits the public; and
- (10) Other factors as the Office deems appropriate to obtain the best value for the District.

§ 2-273.03(b)-(c).

The District's Office of Public-Private Partnerships (the "Office") must evaluate proposals "according to the evaluation and selection criteria contained in the request for proposals," and make publicly available an executive summary of each responsive proposal, "including the scoring for each proposal." § 2-273.03(e)-(f). Additionally, before entering into a public-private partnership agreement, the Office must submit a report to the DC Council outlining, among other things, "how [proposal] responses were scored and how a response was selected according to the criteria and methodology for evaluating responses outlined in the

## COVINGTON

Foggy Bottom Association  
Advisory Neighborhood Commission 2A  
November 30, 2018  
Page 6

request for proposals.” § 2-273.09. The District’s proposed public-private partnership with DHP is not exempt from these requirements.

The District’s “direct negotiation” process apparently dispensed with at least some of these statutory requirements which, as its consultant indicated they might be, are indeed “legal requirements.”<sup>6</sup> Moreover, if the District reaches a final public-private partnership agreement with DHP conditioned on waiving the Certificate of Need for the Tower, without having evaluated such a condition when selecting DHP from among other interested parties, the resulting agreement could be challenged as contrary to the District’s procurement laws and bedrock principles of competitive procurement which mandate reevaluating late-entered modifications and, if the modifications are accorded value in the selection process, affording all competitors the same opportunity.

Given our understandings, the District appears to have skirted fundamental principles of competitive procurement law for a major public-private partnership by allowing a late-entered proposal modification by one party without evaluating that modification, failing to permit other competitors to submit late modifications to their proposals should such a condition be given weight in the evaluation, and continuing to negotiate with DHP whose proposal now contains a condition not contemplated by any original evaluation criteria. By not following these competitive procedures, any public-private partnership agreement entered into with DHP and

---

<sup>6</sup> Nothing in the District’s public-private partnership law provides for a “direct negotiation” process.

## COVINGTON

Foggy Bottom Association  
Advisory Neighborhood Commission 2A  
November 30, 2018  
Page 7

conditioned upon the District waiving the Certificate of Need for DHP's Tower could be subject to challenge.

We are pleased to provide you with these views on the procurement laws in the District of Columbia as they relate to the St. Elizabeths procurement. Please feel free to contact us with any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "E. Sanderson Hoe", with a stylized flourish at the end.

E. Sanderson Hoe